APPEAL NO. 032559
FILED NOVEMBER 18, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on September 10, 2003. The issues at the CCH were:

1. Does the compensable injury of _____ include the [appellant] Claimant's disc hernations at L3-4 and L4-5 on or after September 24, 2002?

2. What is the date of maximum medical improvement [MMI]?

3. What is the Claimant's impairment rating [IR]?

The hearing officer determined that the compensable (low back) injury of _____, includes the claimed disc herniations on or after September 24, 2002; that the claimant reached MMI on March 24, 2001 (the agreed upon statutory MMI date, *see* Section 401.011(30)(B)); and that the claimant has a 23% IR, as assessed by the designated doctor, whose opinion was not contrary to the great weight of other medical evidence.

The appellant (carrier) appealed, contending that the disc hernations at issue preexisted the compensable injury and were unrelated to the compensable injury, that the Texas Workers' Compensation Commission (Commission) erroneously appointed a chiropractor as the designated doctor, that the hearing officer abused her discretion in considering Dispute Resolution Information System (DRIS) notes not in evidence, and that the Commission abused its discretion in the appointment of a designated doctor because the claimant never disputed the initial IR or did not dispute it within a reasonable time. The file does not contain a response from the claimant.

DECISION

Affirmed.

The facts are somewhat convoluted and the claimant testified through a translator with the hearing officer, at least on two occasions, correcting or clarifying the translation. The parties stipulated that the claimant sustained a compensable low back injury on _____.

The claimant was seen at (clinic) on the date of injury by a physician's assistant. The claimant was then referred to Dr. H and treated with Dr. H through September 28, 1999. An MRI performed on August 12, 1999, showed the claimed large disc herniations. At one point Dr. H suggested spinal surgery. The claimant was also seen by Dr. F, the carrier's required medical examination (RME) doctor on December 15,

1999, and Dr. F certified the claimant at MMI on that date with a 10% IR based on 7% impairment from Table 49 (specific disorders of the spine) Section (II)(C) (of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association) and 3% impairment for loss of range of motion (ROM). The narrative commented that the claimant wanted an IR "to be conducted on his back prior to returning to Mexico." The claimant explained that it was urgent that he return to Mexico because his father was dying. The claimant returned to the United States some time in the spring of 2000. The claimant was again seen by Dr. H on July 18, 2000, where Dr. H noted "at one time it was recommended that [the claimant] might be a candidate for surgery."

What happened next is unclear. Although the claimant testified that he had not disputed Dr. F's IR, the claimant also said that he did not know what an IR was. The claimant sought treatment for his back from Dr. W on September 16, 2002, explaining that Dr. W spoke Spanish. The carrier disputed treatment (or payment for the treatment) as unrelated to the compensable injury. Apparently the claimant then contacted the Commission in September 2002. The hearing officer refers to DRIS note No. 28, dated September 27, 2002, which "identified the Claimant as having called telephonically to dispute [Dr. F's] findings," however, the DRIS notes are not in evidence, nor were they forwarded with the file for review. The carrier argues that the DRIS notes were not exchanged and "have not been seen by the carrier." In any event, that contact with the Commission resulted in Dr. A, a chiropractor, being appointed as the designated doctor. Dr. A, in a report dated October 24, 2002 (the narrative is dated October 30, 2001 (sic)), certified MMI on March 24, 2001, "statutory," and assessed a 23% IR based on 5% impairment from Table 49 (Section (II)(B)) plus 1% for involvement of one additional level, 21% impairment for loss of ROM, and 3% for lower extremity sensory impairment, to arrive at a combined value IR of 23%. An additional lumbar MRI, performed on February 14, 2003, showed a "[m]oderately large herniation at L3-4 and L4-5," which was present in the August 1999 MRI.

Based on the MRIs, the hearing officer determined that the claimed herniations are "a direct result" of the work-related injuries of _____. The carrier argues that the herniations preexisted the compensable injury, pointing to medical records which showed preexisting radicular pain. There was contradictory medical evidence as to whether the herniations were preexisting or not and whether they were degenerative in nature. The hearing officer, as the sole judge of the weight and credibility of the evidence, determined that the herniations were caused by the compensable injury and that determination is supported by the evidence.

The carrier next asserts that Dr. A, as a chiropractor, was not qualified to serve as a designated doctor because "the claimant had previously treated with an orthopedic." Whether the designated doctor was qualified was not an issue before the hearing officer and the hearing officer properly did not address that complaint. The carrier further argues that the hearing officer abused her discretion and erred in considering information, namely the DRIS notes, not in evidence and not exchanged. The hearing officer did not commit reversible error in considering Commission records

because whether the designated doctor was properly appointed was not before the hearing officer or the Appeals Panel. If the DRIS notes were to be considered it would have been preferable for the DRIS notes to have been admitted into evidence and to allow the parties to comment or object to the admission. The carrier also argues that the claimant testified that he did not dispute Dr. F's IR. While the claimant may have said that, it is not clear that he even knew what an IR was and, further, there is no set time for disputing an RME doctor's report. Whether the claimant disputed Dr. F's report and the interpretation of the DRIS note were matters for the hearing officer to resolve.

The carrier also contends that the Commission abused its discretion in the appointment of the designated doctor "nearly 3 years after the initial assessment." Although the benefit review conference recites the carrier's position on the MMI and IR issues that the Commission abused its discretion in appointing a designated doctor so long after the first assessment, that matter was never added as an issue. Neither the 1989 Act nor Commission rules set a certain time frame for disputing the RME doctor's report. Further, there is no evidence that Dr. F's report was sent to the treating doctor pursuant to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.3(a) (Rule 130.3(a)) and pursuant to Rule 130.5(a), the Commission may appoint a designated doctor at the request of "a division of the commission."

We have reviewed the complained-of determinations and conclude that the hearing officer's determinations are supported by the evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **TEXAS BUILDERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

ROBERT SIDDONS
11612 RM 2244, BUILDING 1, SUITE 200
AUSTIN, TEXAS 78733.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Edward Vilano
Appeals Judge